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Saving Originalism's Soul

by STEPHEN E. SACHS | — *Leave a Comment*

What shall it profit originalism, to gain academic adherents but lose its soul? As Steven Smith tells it, the "new originalism" has made a disastrous Faustian bargain, with Jack Balkin playing Mephistopheles. It may have gained sophistication and intellectual respect, but it's lost its ability to resist falsehood and manipulation—and lost the firm roots that made "That Old-Time Originalism" great.

To Smith, the new originalism lacks any claim to the Framers' authority. Because it looks to the meanings of the Framers' words, and not to their substantive expectations, it can be made by skilled sophists to justify things "the enactors wouldn't have approved—would perhaps have deplored," like rights to abortion or to same-sex marriage. If the Framers had foreseen such consequences, their Constitution "would have been reworded to avoid the unwanted results, or would not have been enacted at all." That makes the new originalism irrational, a product (at best) of the Framers' "ignorance" and lack of foresight, not their "mindful deliberation." Instead, Smith counsels a return to the "original decision," which (he argues) rules out any deplorable consequences that the Framers would have opposed.

Smith's portrayal is tempting, too. But the old originalism was abandoned for a reason, namely that it was wrong. The Framers didn't enact particular outcomes fixed in amber; they enacted various rules of law, rationally authorizing future actors to put those rules into effect. When those original legal rules require us to consider outside facts, their applications will change as the facts change on the ground. Which facts were supposed to matter is a question of law, language, and history—and not of policy preferences, whether the Framers' or our own. In the end, the soul of originalism remains safe—and the only answer to originalism done badly is more originalism, done well.

An originalism that could frustrate the Framers might seem like an oxymoron. To understand it, consider a simple example suggested by Chris Green, who's written the definitive work in this area. How many seats in the U.S. House

of Representatives should each state get? One approach is to fix the numbers: Maryland six, North Carolina five, and so on. Another is to fix a rule that depends on outside facts—say, that states get seats according to their future populations.

Each approach has benefits. The advantage of a rule is that you don't need clairvoyant Framers to know all the facts. ("Maryland has six, then after 1800 it will have eight, then . . .") As judged by the first U.S. Census, the geniuses at Philadelphia guessed wrong about the relative sizes of North Carolina and Maryland. But the rule they adopted let the outcomes track reality.

On the other hand, rules leave the Framers dependent on people other than themselves. If future actors fail (or deliberately refuse) to feed the right facts into the right formulas, the rules won't do what their Framers wanted. And because rules refer to actual, rather than stipulated, facts, the Framers might have been wrong about those facts, about how their rules would work in practice, or even about whether they were good rules at all.

Sometimes that's worth it. To paraphrase another of Green's examples, when Congress authorized the President to use military force in 2001, the target wasn't the Taliban or Al Qaeda by name, but rather the "persons he determines planned" the 9/11 attacks. Should the President honestly determine that it was Hezbollah all along, then Hezbollah it is, whether or not the enactors would have expected that result, or even would have deplored it. Nor is that strange: the possibility of disagreement was *why* the enactors based the authorization on the President's determination rather than their own. You legislate in general terms only if you're more worried about getting the specifics wrong yourself than about some other actor getting them wrong. (That's why we have general laws against murder and theft—not because juries never make mistakes, but because we can't hire psychics to write very long bills of attainder.)

The core defect of Smith's "decisional originalism" is that the Framers' "original decisions" were often decisions *to rely on outside facts*—even facts that the Framers might not have expected, even facts that might lead to outcomes they would have deplored. No matter how faithful the judges, the Framers' own rules can still produce unforeseen results. Article V, for example, relies on the uncontrollable facts of what two-thirds of each House and three-fourths of the states might someday desire. The Framers' choice to permit amendments in this way might end up mandating things that individual Framers deplored—women's suffrage, say, or uncompensated abolition, or a popularly elected Senate.

Maybe, had the Framers been more prescient, they'd have added specific exclusions to prevent these measures, the way they did to preserve Senate apportionment and the pre-1808 slave trade. Yet we still treat these amendments as law, because Article V says we should. To put it another way, the Framers made a *decision* to restrict the amendment process in certain ways and not in others; the risk that they were unconsciously permitting "deplor[able]" amendments was a risk they were willing to take.

(Note that the same thing happens when the rules don't change. Maybe the Framers, seeing today's America, would regret their choice to apportion the Senate equally. Legally, who cares? The Constitution is law, and hypothetical Framers' regrets are not.)

When the Framers have deliberately chosen to rely on facts, Smith's authority and rationality objections turn out to be fallacies of composition. Particular outcomes the Framers didn't want can result from general legal regimes that they did. Outcomes that are the product of Framer ignorance—because the Framers, had they been more prescient, would have acted to prevent them—don't make the overall legal regime irrational, or mean that it results from anything but mature deliberation. Relying on outside facts, including facts about other people's future preferences, is an eminently rational response to the limits of human knowledge. And there's a deep rationality to a system in which we follow the rules until they're lawfully changed, whether or not their consequences seem ill-advised.

Smith's deeper critique of original meaning is that it involves a bait-and-switch. The Framers enacted various provisions with the words available to them; later interpreters like Jack Balkin came along and turned those words to unforeseen and deplorable ends. Smith is willing to assume that the Balkins of the world get the original meaning right, and that their surprising conclusions follow from their premises. But these concessions are half-hearted. It's hard to avoid the sense that Smith is fighting his own hypotheticals—that he doesn't really believe, say, that the Fourteenth Amendment originally communicated a "principle of equal regard," or that this principle today entails the rights to

abortion and to same-sex marriage. Much of the rhetorical force of Smith's essay results from these smuggled-in doubts. If one actually took the hypotheticals at face value—both what the words meant, and what those meanings require today—then Smith's discomfort with the new originalism is far harder to understand.

Start with the interpretive question. How do we find out the decisions that the Framers made? The standard new-originalist answer is to focus on the original meaning of the Framers' words. Human language can be properly applied, in a relatively precise way, to circumstances far beyond the speaker's ken. Old rules about "stolen goods" apply naturally to iPads, the tax laws include income in Bitcoin, and so on, without giving themselves over to gauzy living-constitutionalist refrains about social evolution and whatnot. That's because the language of the rules makes some changes relevant and not others. To rely again on Green, "the choice of language is a choice about what sorts of changes should make a difference."

Conceivably, one could treat Smith's theory as itself a claim about original meaning. For example, maybe the Founding generation understood the Constitution's language to implicitly exclude any deplorable applications—the way we understand "have you eaten?" to mean recently rather than ever. In that case, Smith's concern for deplorable consequences might be part of what the text would have communicated at the time—it just *is* the original meaning, properly understood. But that claim seems unlikely, as a matter of historical linguistics; and if Smith assumes it's wrong, so can we.

Instead, Smith urges us to focus on the Framers' original decisions, as distinct from the meanings of their words. That has a certain logic to it; the meaning of an instrument contributes to its legal content, but it isn't everything we need to know. For instance, in contract cases involving mutual mistake, a particular term (like the ship "*Peerless*") might have no unique meaning as a matter of linguistics, but our contract law will construe it according to a particular set of rules (e.g., favoring the more innocent party). Maybe Smith's proposals about deplorable consequences were actually part of the Framing-era legal rules governing interpretation. But while a legal system *might* work that way, that's not how we usually understand our system today—and Smith offers no evidence that the Framers understood it that way, either.

Smith's concern seems to be that the original-meaning inquiry can't reach reliable conclusions, as opposed to collapsing into a standard-less search for principles. Did "cruel" in the Eighth Amendment express a "principle of humane punishment," or did it stand in for specific punishments that the Framers didn't like? Or did it mean "ban those specific punishments, plus any others that we'd want to ban if we knew about them"? For contemporaries, as Smith notes, these alternatives make little practical difference; and there's some danger in resting our law on thin evidentiary reeds.

But interpretation, though hard, is also unavoidable. Consider Smith's account of the Fourth Amendment. Although wiretaps were wholly unknown to the Framers, we still know (he says) that the "original decision" was to restrict them. That may be right. But if so, it's because we extract from the Fourth Amendment a rule—or, dare we say it, a principle—concerning a general concept of privacy. To apply that principle faithfully, we need to know its original contours; specific prohibitions that flesh-and-blood Framers had in mind are merely evidence of this law, not the law itself. We have to distinguish meanings from expected applications, simply because no applications of the Fourth Amendment to wiretaps (or to cell phones, the Internet, or people not yet born) were "expected" in the 18th century.

At this point, the wheels have come off the theory. The "decisional originalist," having broken free from the Framers' language in search of tighter constraints, ends up with an even more philosophically complex method of even greater plasticity. How are we to know, as Justice Alito once asked, "what James Madison thought about video games," if not by looking at the language that he helped enact? What did the Framers really think about church and state, over and above what they wrote in the Establishment Clause? Whose informal opinions count, and what do we do if they disagreed? Altering the original law and language based on the Framers' presumed desires, or the Spirit of the Age, or whatever, opens up loopholes that a Jack Balkin of decisional originalism could drive a truck through.

Perhaps there's another way to cabin things. Maybe the Framers might accept correction about unforeseeable *facts* (state populations, wiretaps, whatever), but not about changes in *values*. So if they disapproved of abortion, say, no amount of Balkinizing would be able to make it part of the Constitution—even under a "principle of equal regard."

Wise legislators usually avoid making open-ended moral commitments in the law. That's why the Constitution talks about "establish[ing] Justice" in the Preamble. The operative provisions are designed with an eye to justice, sure, but they also constrain future actors, unlike a direct instruction like "Congress shall make no unjust law." All else being equal, we should hesitate to read constitutional language as if it actually contained a "Justice Clause."

The problem is what to do if the Framers did include something like a Justice Clause. To a new originalist, if that turns out to be the correct historical reading, then it's part of the law, even if future actors have different views of what justice requires. Insisting that the provision can only refer to the Framers' own particular convictions, and not to what justice actually requires, attributes to the 18th century a startlingly relativist and subjective approach to moral questions. If some clause of the Constitution regulated carcinogens, its Framers presumably cared about whether a substance actually causes cancer, and not just whether they thought it would. So why can't they have been interested, when enacting a Justice Clause, in whether a law is actually unjust?

Obviously this all depends on the history. But preserving each of the Framers' substantive conclusions intact might mean discarding the actual law they made. That deserves exactly the same criticisms that Smith wrongly makes of the new originalism. If the Eighth Amendment, let's assume, really bans all inhumane punishments—and if the juvenile death penalty, let's assume, really is inhumane—then why on earth should today's judges permit it? On whose authority would they continue an inhumane practice, when that's precisely what the Eighth Amendment was written to stop? What's rational about preserving the Framers' mistakes, when by assumption that's not what they told us to do?

The soul of originalism is a method, not a collection of results. The theory is aimed at getting the law right, not at advancing any particular political platform. It rules nothing out in advance, looking to what the law and history actually reveal. This openness to potential surprises is a strength, not a weakness: it shows that the theory is robust—that it can handle a variety of different kinds of evidence.

That flexibility, it's true, raises a risk of manipulation. Smith not-so-subtly accuses Balkin, Michael Perry, and even Robert Bork of bending the historical record to support their preferences. But he writes as if such manipulation were largely unstoppable—as if only a fundamental change in interpretive method could build a firewall strong enough to resist it. It'd be far simpler, though, to argue that the manipulators are wrong: that they misunderstand what the Framers did and what results follow therefrom. Is that not enough? And if they aren't wrong, shouldn't that lead Smith to reexamine his own views?

Like anything else, the new originalism can be done poorly, or even fraudulently. That doesn't mean that we should stop doing it—any more than "junk science" should lead us to ban science, or motivated reasoning should lead us to abandon reason. Not every bargain is a Faustian one; some trade-offs really are worthwhile. In each case, we do what we can with the tools that we have. And in the end, as G.K. Chesterton put it, "if a thing is worth doing, it is worth doing badly."

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I'm sincerely honored that Mike, Will, and Steve (whose expertise in these matters, both individually and collectively, greatly exceeds my own) would make the effort to comment on my essay. The comments advance powerful objections to "decisional originalism," as I've reluctantly called it. Even so, I'm not persuaded– not yet anyway-- to abandon the idea. …

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